

A positive duty to prevent sexual harassment

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The Worker Protection (Amendment of Equality Act 2010) Act 2023, which will come into force in October 2024, introduces a new positive duty on employers to take reasonable steps to prevent sexual harassment of their employees in the course of their employment.

As this new duty is being introduced by way of an amendment to the Equality Act 2010, “employees” and “employment” in this context will have the wider meaning included under that Act and so would include workers. However, it does not apply to all types of harassment – it is limited to one particular subset of sexual harassment – namely, unwanted conduct of a sexual nature which has the purpose or effect of violating the individual’s dignity or which creates an intimidating, hostile, degrading, humiliating or offensive environment for them.

What does "reasonable steps" in the Worker Protection (Amendment of Equality Act 2010) Act 2023 mean?

The scope of the positive duty is also still a little unclear as “reasonable steps” is not defined. The previous drafting of the duty referred to “all reasonable steps”, which would have been consistent with the “statutory defence” that employers can currently rely upon to argue that that they should not be held liable for an employee’s actions. However, this was adjusted during passage of the legislation to remove the reference to “all”. This therefore does introduce a new test with a lower threshold than “all reasonable steps”. Quite where the line will fall between “reasonable steps” and “all reasonable steps” remains to be seen but the Equality and Human Rights Commission (EHRC) has confirmed that its technical guidance on sexual harassment and harassment at work will be updated to reflect the new duty, including the steps that employers should take to comply with the law, and that this updated guidance will be subject to consultation. There have also been previous references to the EHRC producing a new statutory Code of Practice based on that technical guidance.

What types of harassment does the Worker Protection (Amendment of Equality Act 2010) Act 2023 apply to?

Provisions specifically allowing employees to bring claims against their employers relating to third party harassment did not survive the legislative journey (see Watering down workplace harassment proposals for more details of this). However, it is worth noting that the new duty does not refer to sexual harassment “by other employees of the employer” – instead it refers to sexual harassment “in the course of their employment”, a phrase wide enough to encompass sexual harassment by third parties.

An employee cannot bring a free-standing claim alleging a breach of this duty in the employment tribunal – such a claim would need to be brought by the EHRC. The extent to which the positive duty is applied proactively address third party behaviour may well therefore depend on the approach to enforcement taken by the EHRC.

If, however, an employee claims to have been subjected to this same subset of sexual harassment (conduct of a sexual nature) and the employment tribunal upholds their claim and awards compensation, then the tribunal must consider whether, and to what extent the employer has also contravened the duty to take reasonable steps to prevent the harassment of employees. If the tribunal is satisfied that there has been a breach, then it can uplift the compensation awarded to the employee by an amount which reflects the extent of the breach, capped at 25% of the amount of the compensation awarded.

It is worth noting that the employee may also bring other types of harassment claims at the same time – as long as a complaint of sexual harassment relating to conduct of a sexual nature has been upheld, it does not need to be the main claim, or even a significant part of the claim. The 25% cap appears to relate to the entirety of the compensation awarded for harassment, not just the compensation awarded for the conduct of a sexual nature.

How employers can prepare for the Worker Protection (Amendment of Equality Act 2010) Act 2023

Although the new duty is not yet in force, employers should be taking steps now to consider what steps would be reasonable to prevent harassment within their organisation. Part of this process may well include sexual harassment risk assessments to identify particular risk factors or areas where steps are required to reduce risks. The original EHRC Technical Guidance: Sexual harassment and harassment at work, whilst still to be updated to reflect the new duty, already sets out a number of practical considerations for preventing harassment that will be useful for employers – such as effective policies and procedures; raising awareness; regular reviews and evaluation; training; proactive detection; and addressing cultural concerns such as increasing transparency and reducing power imbalances. However, if you would like to discuss further how this new duty may affect your workforce, then please contact us.

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